The Constitutionality of the Ohio Arbitration Act

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The Ohio Arbitration Act G. C. 12148-1 to 17, 114 O.L. 137, went into effect July 28, 1931. In order to discuss to any extent the constitutionality of the act a bit of history of the relation of courts to arbitration is necessary. The exact provisions of the Ohio Act will be given later. It suffices here to state merely that it provides for the irrevocability of contracts to arbitrate future disputes and for the enforcement of such contracts by specific performance.

It is an elementary proposition of the common law that "future disputes," clauses, and provisions for arbitration are revocable. *Meacham* v. *Jameston*, 211 N.Y. 346, 105 N.E. 655, Ann. Cas. 1915 C, 851 (1914); *Blodgett Co.* v. *Bebe Co.*, 190 Cal. 665, 214 Pac. 38, 26 A.L.R. 1070 (1923); *Henry* v. *Leheigh Valley Coal Co.*, 61 Cal. App. 182, 215 Pac. 448 (1906). These rules are said to date back to Vynior's Case decided by Lord Coke in 1609. Coke's Reports Part VIII, p. 80, 8 Co. 803, 816 (1609).

> "One bound to an award to stand,
> Well the authority may countermand."

Worrel, Reports of Lord Coke in verse, 1742. (Speaking of Vynior's Case.) The case is important for the dicta "if I submit myself to arbitratiment—yet I may revoke it, for my act or my words cannot alter the judgment of the law to make the irrevocable "which is of its own nature revocable." Since in this case recovery on the bond was sued for and obtained surely Vynior's Case did not take an unfavorable view of arbitration. Later cases taking such a view have been based on the dicta of this case however.

Soon afterward the courts refused to allow more than nominal damages for breach of a contract to arbitrate, even under seal. The theory of the courts was that the plaintiff must show actual damage and that no actual damage was incurred by such

a breach since to force the parties into the courts could injure no one. Thus the right of a party to breach with impunity contracts to submit to arbitration was recognized but the basis for such decisions was not that of revocation of agency, the principle invoked in the dicta in Vynior's Case but the theory that to hold otherwise would "oust the jurisdiction of the courts."

This phrase had not appeared in any of the earlier cases. It is first seen in *Kill* v. *Hollister*, 1 Wils. 129 (1749). The doctrine of "ousting the jurisdiction of the courts" can be traced indirectly to the Statute of Fines and Penalties, 9 William III (1687), at least in the case of contracts under seal, since this statute allowed the court to go behind the bond and award to that praintiff the amount which he was actually damaged. Statutes concerning arbitration were passed in England in 1698, 1833, 1854, 1889, and 1934 but in none was any distinction made between the submission of an existing dispute and any future disptes that might arise under the contract. See Sayre: "Development of the Commercial Arbitrated Law," 37 Y.L.J. 595. That distinction thus appears only in American statutes. Many have tried to give the impression that our modern arbitration acts are copies of the English Law. In truth they differ in almost every important detail. The British law devotes itself more to providing an adequate procedure for arbitration and less to rigid enforcement than do our American Acts. The enforcement of arbitration agreements is entirely discretionary with the courts of England. *Bristol Corp.* v. *John Aird & Co.* [1913] App. Cas. 241, 257; *Metropolitan Tunnel and Public Works, Ltd.* v. *London Electric Ry.*, [1926] Ch. 371, 388-390. Further their act makes no provision for compelling arbitration by direct court order. Philip G. Phillips, 83 UNIV. PA. L. R. 119 (Dec., 1934).

Thus with the establishment of the American court system the theory of "ousting the courts of jurisdiction" was firmly imbedded in the law and uniformly followed as to contracts concerning future disputes. *Mecham* v. *Jameston*, supra; *Blodgett Co.* v. *Bebe Co.*, supra; *Henry* v. *Leheigh Valley Coal Co.*, supra; *U. S. Asphalt Refining Co.* v. *Petroleum Co.*, 222 Fed. 1006 (1915); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120, 44 Sup. Ct. 274 (1923); *Conner* v. *Drake*, 1 Ohio St. 166, 168 (1853). Other cases place such holding on "public policy" which seems to be an outgrowth of the same

doctrine: *Stephenson* v. *Poscataqua F. & M. Ins. Co.*, 54 Me. 55 (1866); *Hurst* v. *Litchfield*, 39 N.Y. 377 (1868).

Arbitration agreements concerning present disputes were under the common law revocable up to the time of the award: *Butler* v. *Greene*, 49 Neb. 280, 68 N.W. 496 (1896); *Sartwell* v. *Soules*, 72 Va. 270, 48 Atl. 11, 82 Am. St. Rep. 943 (1900); *Decham Iron Works* v. *Bank of Commerce and Trust Co.*, 214 U. S. 515, 29 Sup. Ct. 697, 53 L. Ed. 1064 (1909); *Mead* v. *Owens*, 83 Vt. 132, 74 Atl. 1058 (1913). Statutes in many states, however, have made irrevocable a contract for arbitration entered into as to a present existing dispute: *White Eagle Laundry Co.* v. *Slawek*, 296 Ill. 240, 129 N.E. 753 (1920); *Cocalis* v. *Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923); *State ex rel School District* v. *Andree*, 216 Mo. 617, 116 S.W. 561 (1919). "Before the enactment of the arbitration act the court could not specifically enforce an agreement to arbitrate but left the parties entirely to their remedies at law for a breach of a contract, and the effect of a statute making the agreement irrevocable is merely to provide for the specific performance of the contract and the statute violates no constitutional rights" *White Eagle Laundry Co.* v. *Slamek*, supra. No claim was made that such contracts outsed the jurisdiction of the courts, such a rule being applied only to contracts concerning future disputes.

This was about the situation in Ohio up until the passage of the present act. G. C. 12148, 29 O.L. 264, repealed in 114 O. L. 137, which provided, "Except when the possession or title of real property may come into question all persons *who have a controversy* may submit it to arbitration or umpirage of any person or persons to be mutually agreed upon by the parties and to make such submission a rule of any court of record in the state." The former Ohio Act is no great departure from the common law rule but it certainly is not as is stated in 4 UNIV. CINN. L. REV. 61 (1930) an affirmation of the common law rule.

The next logical step would be to provide that the courts could specifically enforce contracts to arbitrate future disputes. As previously seen such has been allowed in England since 1889. The Arbitration Act of 1889, 52 & 53 Vict. C. 49 (1889). And as seen, there the courts have the discretion to enforce or not to enforce specifically the arbitration agreement.

The Ohio Arbitration Act succeeded G. C. 12148. Its most important provision is contained in section 1. "A provision in any written contract—to settle by arbitration a *controversy thereafter arising* out of such contract or out of the refusal to perform the whole or any part thereof, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to arbitrate, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Other sections provide for the appointment by the court or arbitrators in case of refusal of one party to so appoint, for the compelling of witnesses, taking of oaths, punishment by contempt for refusal to testify, etc. Section 9 provides for a confirmation action in the courts within one year and section 12 provides that upon such confirmation the court must enter judgment in conformity therewith.

Thus it is seen that the legislature took the full step, not providing as in England that the courts *could* specifically enforce such contracts but providing that the courts *shall* enforce them, leaving no discretion at all in the matter.

Is such a statute constitutional? It has been held so in other states, including New York. In fact the Ohio Act is taken from the New York Act. Similar statutes have been passed in Massachusetts in 1925, Hawaii 1925, California 1927, Pennsylvania 1927, Louisiana 1928, Arizona 1929, Connecticut 1929, New Hampshire 1929, Rhode Island 1929, New Jersey 1923, Oregon 1929, Wisconsin 1931, and Federal 1925. The New York Act was passed in 1920.

The constitutionality of the New York law was raised and determined in 1921 in the notable case of *Berkovitz* v. *Asbid and Houlberg* 230 N. Y. 261, 130 N. E. 288 (1921).

The Ohio situation is peculiar, however, because of the presence of Art. 1, Sec. 16 of the Ohio Constitution. The effect of this section we shall discuss later. But in the absence of Art. 1, Sec. 16 the reasoning of the Berkovitz case, if followad, would be as applicable to Ohio as to New York.

The New York act was assailed in the Berkovitz case on the grounds: (1) that it violated the right of trial by jury given by Art. 1, Sec. 2 of the New York Constitution; (2) that contracts to arbitrate future disputes "ousted the jurisdiction of the

courts"; (3) that such contracts were against public policy; and (4) that the obligation of contracts was impaired.

The New York Court of Appeals speaking through Judge Cardozo answers each of these contentions. (1) The right of trial by jury is one that may be waived and is waived by the consent to arbitrate. And such consent is found even though the agreement to arbitrate came before the passage of the statute. "A consent none the less, it was, however deficient may once have been the remedy to enforce it. Those who gave it, did so in view of the possibility that a better remedy might come. They took the chances of the future." (2) The Court says that it does not "oust the jurisdiction of the courts" but simply introduces a new plea. Judge Cardozo says at page 274 "Power, though not transferred, is still not to be withdrawn, if fundamental and inherent in the conception of a court with general jurisdiction in equity and law. Changes, we may assume, will be condemned if subversive of historical traditions of dignity and power. Such is not the change effected by this statute. The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation." In other words the court feels that this is merely a matter of remedy which can be dealt with by the legislature, the law which the courts enforce not being a fixed and unchangeable thing. (3) Public policy is declared by the legislature and it had by statute declared the public policy inapplicable here. "In fact even before the statute such a contract was not illegal and a nullity. Public policy was thought to forbid that the promise be specifically enforced. Public policy did not forbid an award of damages if it were broken." (4) Here the opinion contents itself with merely asserting as a self evident fact that "The obligation of contracts is strengthened, not impaired." Since there is no doubt but that the parties had contracted and that to specifically enforce a contract does not impair the obligation of contracts this assertion cannot be questioned.

The principal of revocation, an agency principal, on which all these cases are based, at least historically, was not mentioned. This, however, can raise no new objection to the Ohio Act since the law of agency can surely be changed by statute to make such power irrevocable.

The constitutionality of the New York statute as regards the Federal Constitution was later upheld in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 44 Sup. Ct. 274 (1923). Prior to this statute an agreement to arbitrate was legal in New York and damages were revoverable for a breach thereof: *Haggart* v. *Morgan*, 5 N. Y. 422, 55 Am. Dec. 350 (1851). But specific performance of this promise could not be enforced and the promise could not be pleaded in bar to an action and it could not support a motion to stay. *Finucane Co.* v. *Board of Education*, 190 N. Y. 76, 82 N. E. 737 (1908). "The net effect of the whole thing, including the confirmation is a suit for the specific performance of the contract to arbitrate": *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929).

Another line of attack on the Ohio Act is, that it discriminates unjustly in that it excludes in G.C. 12148-1, subsection a and b, contracts of labor or relating to employment. But this has been held reasonable discrimination and constitutional. Many laws are not of universal application. *Pacific Indemnity Co.* v. *Insurance Co. of North America*, 25 F. (2d) 930 (1928).

The case of *Baltimore and Ohio Ry. Co.* v. *Stankard*, 56 Ohio St. 224, 46 N.E. 577, 49 L.R. 381 (1897) seems to stand in the way of the Ohio Act. The syllabus of that case reads: "One of the rules of the relief department of a railroad company, provided that all the claims of beneficiaries should be submitted to the determination of the superintendent whose decision should be final and conclusive, unless appealed to the advisory committee and in case of such appeal, the decision of the committee should be final and conclusive upon all parties without exception or appeal: Held, that after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action in the court for the recovery of money due thereon, and that such rule is not a bar to the action."

On page 231 is the significant language, "A long line of decisions hold that parties cannot by contract take away the jurisdiction of the courts in such cases and the attempt to do so is void. While courts usually base their decisions upon the ground that parties cannot by contract in advance oust the courts of jurisdiction of actions, a more satisfactory ground is, that under our constitution all courts are open, and every person for an injury done him in his lands, goods, person, or repu-

tation shall have his remedy by due course of law. Art 1, Sec. 16. Courts are created by virtue of the constitution and inhere in our body politic as a necessary part of our system of government, and it is not competent for anyone by contract or otherwise to deprive himself of their protection. The right to appeal to the courts for the redress of wrongs, is one of those rights which is in its nature under our constitution inalienable and cannot be thrown off or bargained away." The court in this case admits that parties can contract to leave all questions of *fact* which arise in a future dispute to arbitrators, "leaving the question of law to be settled by the courts upon proper proceedings. The ultimate question to be determined—the liability or non-liability of the parties must be left to the courts."

The Stankard case was cited with approval in *Meyers* v. *Jenkins, Adm'r.*, 63 Ohio St. 101, 57 N.E. 1089, 81 Am. St. Rep. 613 (1900). The plaintiff here was a member of the Independent Order of Odd Fellows. Plaintiff sued for money which he claimed was due on a sick benefit policy. The defendant lodge denied the jurisdiction of the court in that plaintiff on application for membership had signed an agreement obligating himself to seek his remedy for all rights or account of such membership or connection therewithin the tribunals of the order only, without resulting for the enforcement in any court or for any purpose to the civil courts. The court here held for the defendant on the ground that the plaintiff was estopped since, after his cause of action arose, he had submitted to the tribunals of the lodge and that he had a right in such tribunals to appeal but had not done so.

At page 120 the court says by way of dicta, "After a right has accrued or an obligation has been incurred, a party may waive his rights and refuse and neglect to enforce them but he may not by contract in advance renounce his rights to appeal to the courts for the redress of wrongs. The whole state has an interest in all its inhabitants and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs."

The above two cases were cited as the weight of authority in a note in 51 A.L.R. at page 1420. It must be noted of course that they were not decided under a statute making future disputes irrevocable as does the present Ohio Arbitration Act.

A contract to submit future disputes to arbitration "is a mere executory agreement and does not furnish a bar to an action on the contract. *Tilden* v. *Barnard*, 12 O.C.C. (N.S.) 193, 31 O.C.C. 255 (1910). The defense of errors in law was not open to a party where in the case of an existing dispute arbitrators were appointed and an award made, the parties having agreed that the award should be final and conclusive: *Phelger* v. *Renner*, 13 Ohio App. 96, 32 O.C.C. (N.S.) 329 (1920); *Ormsby* v. *Bakewell*, 7 Ohio 98 (1935). But note that these cases were where the parties had agreed as to an existing dispute. Courts of equity will not grant specific performance of an agreement to submit to arbitration. *Conner* v. *Drake*, 1 Ohio St. 166 (1853); *Shafer* v. *Metro-Goldwyn-Mayer Distributing Corp.*, 36 Ohio App. 31, 172 N.E. 689 (1931). But these cases too were before the statute.

In *Paddock Hodge Co.* v. *Grain Dealers National Association et al.*, 18 Ohio App. 66, 19 O.L.R. 396 (1921), the court refused to enjoin defendant Grain Dealer Association from ousting the plaintiff from the association or refusing to abide by an arbitration, an arbitration however agreed to after dispute arose. So this case on its facts too gives little assistance in our problem here. There are dicta in the case however to the effect that the Grain Association could adopt rules and by-laws providing for the arbitration of all matters of difference pertaining to the grain business that might arise between its members, and that the Grain Association could oust from the organization any member who refused to so arbitrate and could make such fact known publicly. This case therefor goes even further than any New York case decided before the present statute.

Cases holding that a party could revoke at any time a contract to arbitrate future disputes and that such contracts ousted the "jurisdiction of the courts" were not peculiar to this state. All states before their present "future disputes" statutes held exactly the same way. An outstanding case is *Meacham* v. *Pameston, Franklin and Clerefield Ry. Co.* Supra. In fact the opinion was written by Judge Cardozo, who also wrote the opinion of the Berkovitz case, supra, which upheld the New York Arbitration Act of 1920. The syllabus reads, "A provision in a contract for the construction of a railroad conferring upon the chief engineer of a railroad company power to decide all matters in dispute arising or growing out of the contract and

by which each party waives all right of action, suit, or suits or other remedy in law or otherwise under this contract or arising out of the same, to enforce any claim except as the same shall be determined by the arbitrator" is open to the objection that it is an independent covenant or agreement to provide for the adjustment and settlement of all disputes and all differences by arbitration to the exclusion of the courts, and is invalid." Other cases so holding are: *Niagra Fire Insurance Co.* v. *Bishop,* 154 Ill. 9, 39 N.E. 1102 (1884); *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co., Ltd.,* 222 Fed. 1006 (1915); *Stephenson* v. *Poscataqua F. & M. Ins. Co.,* 54 Me. 55 (1866); and *Hurst* v. *Litchfield,* 39 N. Y. 377 (1868).

Since therefore the Standard and the Meyers cases, supra, were decided in the absence of such a statute as now exists there is nothing conclusive about their holdings, as such, but the language to the effect that Art. 1, Sec. 16 stands in the way is more important. Is Art. 1, Sec. 16 a bar to the constitutionality of the Ohio Arbitration Act? If not we think that there is no doubt of its constitutionality. What does Art. 1, Sec. 16 mean? Cases invoking it are very few and except for the Stankard and Meyers cases not at all in point. And unless these cases are conclusive of the issue the question must be examined as of first impression.

The Berkovitz case, supra, deciding that the New York Act was constitutional discussed the right of the *Courts* that they should not be ousted of jurisdiction. The Ohio Constitution speaks of the right of "every *person*" that the courts would be open. It will not answer the question to say that the Ohio provision is a part of the Ohio Constitution and that the question of "ousting the courts of jurisdiction" is not a constitutional provision. For the right of the courts not to be ousted of jurisdiction is implied from the constitutional creation of the courts themselves. The New York courts did not claim that the courts could by legislative enactment be ousted of jurisdiction but only that the particular provision had not ousted them of jurisdiction, that it was merely the interposition of a plea.

Is there here any difference in the constitutional right of the courts and the constitutional right of a person? We can see none. To say that the courts are not "ousted of jurisdiction" is to say that they still have jurisdiction. To say that the courts

still have jurisdiction is to say that the courts are still open. And if the courts are still open a party has not been deprived of any constitutional right and the Ohio Arbitration Act is constitutional.

It might be claimed that, although the above reasoning would seem to follow, it is defective in that the court might say that, although looking at the situation from the viewpoint of the courts, the courts have not been ousted of jurisdiction, yet, looking from the viewpoint of the parties, the courts are not, within the meaning of the constitution, "open." If such reasoning were followed it would seem that the Ohio Act would of necessity be held unconstitutional. After holding that the courts are not "open" the only possible aventue to holding the Ohio Act constitutional would be to hold this constitutional right of a person alienable. But this right has been declared inalienable in the Stankard case, supra, and we see no reason why the courts should reverse its decision on this point. A court would not indulge in the fine distinction above and then held the right alienable.

But we maintain that the court will not look with any more favor to the rights of persons than to the rights of the courts. As it follows from the constitutional creation of a judiciary that the courts have a constitutional right not to be ousted of jurisdiction so it follows that a perosn has by such creation a constitutional right that the courts should be open. It co-exists with the before mentioned right of the courts and the very fact that Judge Cardozo does not mention it shows that it was not regarded as being on a higher plane than the right of the courts there discussed. Surely the courts are not more jealous of the rights of an individual than they are of the rights of the public at large which is termed the right of the courts.

It seems, therefore, that the Ohio courts can possibly but not too logically distinguish the Ohio situation from the one existing in New York and the only question is whether the Ohio courts will choose to follow the reasoning of the Berkovittz case and decree specific performance which all courts refused before the passage of "future disputes" statutes "because the court will refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a descretion (the right to revoke) which the contract on the law invests him with"; Cooley, J. in *Rust* v. *Conrad*, 47 Mich. 449, 455, 11 N.W. 265, 267 (1882).

No cases involving the Ohio Act have been found but there is nothing unusual in that fact in view of the relatively recent passage of the act. The same situation existed in New York and other states until the Bar became more familiar with its provisions. Then many cases arose all holding that the award not reversable for errors of fact or law on the point of the arbitration and that the jurisdiction of the courts was not ousted. *δ toh & Co.* v. *Bayer Oil Co.* 198 App. Div. 881, 191 N.Y.S. 290 (1922); *Everett* v. *Brown,* 120 Misc. 349, 198 N.Y.S. 462 (1923); *Liggett* v. *Jarrington Bldg Co.,* 114 Conn. 425, 158 Atl. 617 (1932); *Anderson Trading Co.* v. *Brimberg,* 119 Misc. 784 (1922); *Marchant* v. *Mead-Morrison Mfg. Co.,* 252 N.Y. 284, 169 N.E. 386 (1929).

The application of the New York act, which could be the same as under the Ohio act is discussed by Osmond K. Fraenkel in 32 COL. L.R. 623. The whole field of arbitration is excellently reviewed in the UNIV. OF PA. L. REV. for December, 1934, the entire issue being devoted to that subject. Other good discussions are contained in 34 YALE L. J. 480; 37 YALE L. J. 595; N. Y. L. JOUR. for Jan. 14, 1925 and Dec. 17, 1925 and 13 A. B. A. JOUR. 667. An excellent book on the subject is COMMERCIAL ARBITRATION AND THE LAW by H. Cohen.